United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1913

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN THE MATTER

—OF—

SAREX CORPORATION,

Bankrupt.

SELENA GOUDEAU,

Plaintiff-Appellee,

v.

IRVING ARZT, Trustee of Sarex Corp., Bankrupt,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

HENRY & BRECKER
Attorneys for Defendant-Appellant
40 Exchange Place
New York, New York 10005
Telephone: (212) HA 5-7440

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

TABLE OF AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Bankruptcy Judge err in concluding that the property in question was sufficiently described in the security agreement so as to render plaintiff-appellee's lien valid against said property and the proceeds from the sale of said property?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

In the Matter

Docket No.
74-1913

-of-

SAREX CORPORATION,

Bankrupt.

----------x

SELENA GOUDEAU,

Plaintiff-Appellee,

v.

IRVING ARZT, Trustee of Sarex Corp.,
Bankrupt,

Defendant-Appellant.

----------x

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order of District Judge Lawrence Pierce, dated May 22, 1974 (p.23a), which affirmed the order of Bankruptcy Judge Roy Babitt, dated February 2, 1974 (p.27a), granting the motion of Selena Goudeau, the plaintiff-appellee herein, for an accounting and turnover of funds and overruling the defenses of the trustee in bankruptcy, the defendant-appellant herein, to a claimed security interest.

The trustee appeals only from so much of the memorandum opinion below of District Judge Pierce, dated May 22, 1974, (p.23a) and the opinion below of Bankruptcy Judge Babitt, dated January 15, 1974 (p.32a) as determines that the security agreement between Sarex Corporation, the bankrupt herein and the plaintiff-appellee, dated July 15, 1970 (p.57a) creates a valid security interest in the assets sold by the trustee at a lien sale and that accordingly, plaintiff-appellee is entitled to so much of the proceeds of said sale as represents the principal and secured interest due her under the said security agreement (p.57a).

On July 15, 1970, twenty-nine (29) days prior to the filing of its Petition for an Arrangement under Chapter XI of the Bankruptcy Act, Sarex Corporation borrowed $10,000.00 from the plaintiff-appellee. At the time of the loan, plaintiff-appellee was a director of Sarex Corporation and the wife of the president and principal executive officer of Sarex Corporation. In connection with this loan, Sarex Corporation executed a security agreement (p.57a) granting a security interest to plaintiff-appellee in the collateral described in the

agreement as follows:

Items	Location, etc.
Machinery,equipment and fixtures; molds, tools, dies, component parts including specifically the:	To be located either at the Debtor's plant in North Bergen, New Jersey; and in the case of the molds also at the plants of contractors who may be using said molds in the manufacture of products for the Debtor.
1 x 1 two cavity cassette cover and base mold	
2 x 2 four cavity cassette cover and base mold	
One twenty-four cavity roller mold	
One sixteen cavity hub mold	

A financing statement (p.59a) describing the aforesaid security interest was duly filed by the secured party on July 23rd, 1970, at which time the first specified item of collateral, to wit, "1 x 1 two cavity cassette cover and base mold" was released from the collateral.

While the arrangement proceeding was still pending and the debtor and debtor-in-possession under the control of her husband, Mr. Seda, plaintiff-appellee applied for and was granted without opposition by debtor-in-possession, an order authorizing her to reclaim possession of the collateral granted her in the said security agreement (p.57a). Early in the ensuing bank-

ruptcy proceeding, a landlord's distraint sale in New Jersey was conducted under the authority of the Bankruptcy Court and all of the tangible assets of the bankrupt (upon all of which plaintiff-appellee asserted a security interest) was sold. Thereafter, the trustee successfully vacated any lien on the part of the landlord upon the proceeds of said sale and recovered same for this estate.

Although the proceeds of the collateral specifically described and identified in the security agreement (p.57a) amounted to only $40.00, the aggregate proceeds of all of the property sold was in excess of $40,000.00. The latter amount was more than sufficient to pay plaintiff-appellee's loan of $10,000.00 plus interest in full.

The trustee opposed below plaintiff-appellee's efforts to apply the proceeds of the sale to her loan and interest; and asserted that the description of the collateral in the security agreement was insufficient to create a security interest in any collateral save for the specifically identified molds which had been sold for $40.00. The Bankruptcy Judge held for the

plaintiff-appellee finding that all of the assets sold at public auction were subject to her security interest. The District Court Judge affirmed the Bankruptcy Judge's decision.

POINT I

PLAINTIFF-APPELLEE'S SECURITY INTEREST ATTACHES ONLY TO THE SPECIFICALLY IDENTIFIED MOLDS.

Plaintiff-appellee has no security interest in any assets except those which were specifically itemized because the language in the security agreement (p.57a) fails to reasonably identify the collateral.

The phrase "machinery , equipment and fixtures" without a designation "all" machinery and equipment or "some" machinery and equipment, and without any further indication of which machinery and equipment is intended to be covered, leaves the reader with uncertainty as to which assets of a debtor are hypothecated. Confusion is compounded by specific language following the unexplained general terminology. Added to the description is "specifically including" (specific description of four (4) articles). However, there is still no explanation of what is excluded. Had the specific description been preceded by the time honored phrase, "including but not limited to" some clarification would be evident that something more was intended than the specifically identified articles; but, all such clari-

fication is missing.

A string of general words:

> "machinery, equipment and fixtures; molds, tools, dies and component parts";

are specified without the prefix "all" or any other qualifying language to indicate which of the actual items of property owned by the debtor are included under each general category. With the exception of the designation that four (4) specifically described molds are specifically included; no further clue is given as to which machinery, equipment, etc., is covered by the security interest. This court must enforce the agreement of the parties as it is written, Kipe Offset Process Co., v. U.S., 122 F.Sup. 323 (S.D.N.Y. 1954); American Brake & Shoe Foundry v. Interborough Rapid Transit, 26 F.Sup. 954,56 (S.D.N.Y. 1939), and clearly the subject security agreement (p.57a) grants a security interest in no collateral except that which is specifically described therein. Resort to familiar rules of construction to supply what the parties themselves omitted is unavailable because it would deprive third parties of the necessary ability to examine the security agreement

disclosed to them by financing statements filed under the Uniform Commercial Code and to be apprised thereby of the actual encumbered property. Burdening parties searching the record with the construction of ambiguous descriptions in security agreements is inconsistent with the purposes of the Uniform Commercial Code and will invalidate a security interest under Uniform Commercial Code Sections 9-203(1)(b) and 9-110. In re Laminated Veneers, Inc., 471 F.2d 1124 (2d Cir. 1973).

Although UCC, Section 9-402 provides that a financing statement is valid where it contains a statement "indicating the types, or describing the items of collateral..." the requirement for a security agreement is more narrow. Section 9-203 (1)(b) requires that the security agreement contain "a description of the collateral ...". This is defined in Section 9-110 of the Uniform Commercial Code:

> "For the purposes of this article any description of personal property... relating to the contents of a financing statement...is sufficient whether or not it is specific if it reasonably identifies what is described."

Therefore, while descriptions such as "motor vehicles", "dental equipment", "all fixtures, chattels and articles of personal property", have been sustained as valid descriptions in financing statements, Bank of Utica v. Smith Richfield Springs, Inc., 58 Misc. 2d, 113, 294 N.Y.S. 2d, 797 (Sup.Ct. Oneida Co.1968); In re Davidoff, 10 UCC Reporting Service 726 (S.D.N.Y. 1972); Sunshine v. Sanray Floor Covering Corp., 64 Misc. 2d 780, 315 N.Y.S. 2d, 937 (Sup.Ct.Sull.Co. 1970); such descriptions are not sufficient in security agreements. The reason is clear. While security agreements actually require a description of collateral, the financing statement is satisfied by such a description or by indicating the types of collateral. Therefore, while "machinery, equipment and fixtures" may indicate the type of collateral to satisfy a financing statement, it surely is not a description of the collateral necessary to satisfy the requirement of a security agreement, as required in UCC, Section 9-203 (1)(b) and defined in UCC, Section 9-110.

This distinction between financing statements and

security agreements and the necessity of adequate descriptions in security agreements so as to communicate to third parties a knowledge of which of the debtor's property is subject to the security interest, has been recognized and explained by our circuit in In re Laminated Veneers, Inc., supra.

There, a series of specifically described items of property was enumerated in a security agreement followed by an omnibus clause:

> "In addition to all the above enumerated items, it is the intention that this mortgage shall cover all chattels, machinery, equipment, tables, chairs, work benches, ..."

Our circuit held this security interest did not extend to two (2) automobiles which were not specifically identified in the schedule despite the secured parties' argument that the security interest expressly attached to "all equipment" and that equipment is a residual category under the code "which includes all goods not included in the definition of inventory, farm products or consumer goods. (T)hus automobiles would fall within this broad category if the definition of Section 9-109 governed for the purposes of the

security agreement."

Notwithstanding this definition, the court held that the word "equipment" did not sufficiently describe the two (2) automobiles as to satisfy a potential creditors' inquiry. Reading the security agreement did not reveal that the automobiles were covered by the security interest. This conclusion was reached despite the word "all" preceding "equipment".

On the other hand, in our case, there is no indication in the subject security agreement (p.57a) concerning which machinery, equipment, fixtures, molds, tools, dies or component parts are included in the security interest except the specifically identified items. Here, even the word "all" is absent. How, upon reading this security agreement, could a potential creditor ascertain which of debtor's property was subject to security interest (p.57a) without recourse to something further to ascertain the intent of the parties, unless the parties are limited to what they have written in the agreement, to wit, the specifically identified articles. To search elsewhere for the parties intent is in derogation of Laminated Veneers,Inc.,

and invalidates the security interest for failure of the agreement to give proper notice.

POINT II

THE DISTRICT JUDGE AND THE BANKRUPTCY JUDGE ERRED IN CONSTRUING THE AGREEMENT.

The Judges below disregarded the requirements of the Uniform Commercial Code in construing the intent of the parties respecting the description of collateral in a security agreement and by so doing ordered the enforcement of an invalid agreement.

The law simply stated requires the intentions of the parties in a security agreement respecting collateral to be reasonably specific by virtue of the mandate of Uniform Commercial Code Sections 9-110 and 9-203(1)(b). In re Laminated Veneers, Inc., supra.

Undeniably the security agreement (p.57a) does not state "all" machinery, equipment, etc.", nor does it express any clue as to which "machinery, equipment,etc." is intended to be covered. The specifically described collateral is not stated to be in addition to other collateral but merely included. Thus, recourse to the express words of the agreement provides plaintiff-

appellee with no comfort and does not extend her security interest to any property owned by the debtor with the exception of the four (4) identified molds. The courts below could have, and because of the requirement of adequate notice as to the collateral in a security agreement, should have enforced the contract in accordance with its plain written words. Kipe Offset Process Co. v. U.S., supra.; American Brake & Shoe Foundry v. Interborough Rapid Transit, supra.

Instead, the Bankruptcy Judge sought out the intention of the parties thereby resorting to construction of the security agreement. Liberty Nat. Bank & Trust of Savannah v. Bankers Trust Co., 150 F.2d 453 (5th Cir. 1945); Welsbach Engineering & Management v. I.R.S., 140 F.2d 584 (3d Cir. 1944), Cert.Den. 322 U.S. 751; Golden State Bridge & Highway District v. U.S., 125 F.2d 872 (9th Cir. 1942), Cert.Den. 316 U.S.700. It is axiomatic that a court will not "construe or interpret" a contract unless there is ambiguity. Standard Title Insurance Co. v. United Pacific Insurance Co., 364 F.2d 287 (8th Cir. 1966); Elbow Lake Coop Grain Co. v. Commodity Credit Corp., 251 F.2d 633

(8th Cir. 1958); Kenney Construction Co. v. Allen, 248 F.2d 656 (D.C. Cir. 1957); Filtrol Corp. v. Loose, 209 F.2d 10 (10th Cir. 1953); Occidental Life Insurance Co. v. Marmaduke Corbyn Agency, 187 F.2d 553 (10th Cir.1951); N.Y.Cent.R.R.Co. v. General Motors Corp., 182 F.Supp.273 (N.D. Ohio 1960); Petro v. Ohio Cas. Ins. Co., 95 F.Supp. 59 (S.D. Cal 1950). An agreement is ambiguous when it is susceptible of two different meanings. Zehnder v. Mishaud, 145 F.2d 713 (8th Cir. 1944). Thus, by necessity, the Bankruptcy Judge, in seeking and finding the intent of the parties without inflexibly adhering to the express language of the agreement, admits the fatal ambiguity which invalidates the description of the collateral under the Uniform Commercial Code. The implication in his opinion (p.51a) that the Trustee's evidence regarding the parties' intentions would have been admissible, assumes the vagueness of description by permitting parole evidence to explain the terms of a written agreement. All of this is inconsistent with the requirement that security agreements describing collateral "must be reasonably specific ". In re Laminated Veneers, Inc., supra.

The eloquence of the Bankruptcy Judge's opinion (p.51a) relying upon "the spontaneous yield of what the parties intended by the language used" is a judicial nicety used to say that the parties did not use the words on paper that were intended by them in making their agreement; that the words used did not say what was meant; that the agreement was ambiguous. The Bankruptcy Court below in its certainty as to the intentions of the parties, rewrites the agreement by adding the all important omission "all" machinery, equipment, etc.; and by inserting after the qualifying word including, the all important omission "but not limited to". Thus, the description of collateral is rewritten to read "all machinery, equipment, etc., including but not limited to specifically the (specifically described collateral)". In his opinion, the District Judge affirms the Bankruptcy Judge's "reading of the security agreement". (p.24a).

But, absent ambiguity (which the courts below do not expressly find for it would be fatal to the validity of a security agreement) the court shall not make contracts for parties, American Sumatra Tobacco v. Willis,

170 F.2d 15 (5th Cir. 1948); nor will it revise or rewrite them, Summers v. Travelers Insurance Co., 109 F.2d 845, 47 (8th Cir. 1940); Sun P&P Ass'n. v. Remington P&P Co., 235 N.Y. 346 (1923). Specifically, courts should not substitute one word for others (as has been done below), Occidental Life Insura e Co. v. Marmaduke Corbyn Agency, supra.

It is respectfully submitted that in its zeal to prevent a hardship, to one of the parties, the courts below have substituted their judgment as to what the parties should have said or what one of the parties would have inserted had it occurred to them, in the place and stead of what was actually said. This ignores, however, the rights of third parties which are jealously guarded by the notice requirements of the Uniform Commercial Code. This case represents the classic example where events transcend the limits of the parties initiating the circumstances. While a case of equity could be made as between Sarex the bankrupt and plaintiff-appellee for reforming an agreement to conform to their mutual understanding, when rights of creditors become involved these equities disappear. To hold

otherwise and permit a court to rewrite a description of collateral in a security agreement is to erase the very protection which the Uniform Commercial Code bestows upon people in commerce.

In less compelling situations courts resist such conduct:

> "But, where the language is clear in the absence of misrepresentation, the courts are not free to rewrite a commercial contract entered into at arms length by fully competent parties." Columbia Hospital v. U.S. Fidelity & Co., 188 F.2d 654,59 (D.C. Cir. 1951), Cert.Den. 342 U.S. 817 (By virtue of the relationship between plaintiff-appellee and the bankrupt, even an arms length transaction does not exist, further weakening her claim to favorable construction of the security agreement to the detriment of the bankrupt's creditors).
>
> "'Where a contract is plain and unambiguous it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto and a corresponding advantage to the other.'" N.Y.Cent.R.R.Co. v. General Motors Corp., 182 F.Supp. 273,84,5 (N.D. Ohio 1960)
>
> "A contract that is plain and unmistakeable in its terms may not be rewritten by a court to conform to what one of the parties may have thought the contract ought to be." Sterneck v. Equitible Life Insurance Co., 237 F.2d 626,29 (8th Cir. 1956).

> "It is clearly the function of a court to give affect to contracts as they are written; a court cannot add a provision to the contract merely because the court thinks either that such a provision should be in the contract or that the parties would have inserted a provision covering a particular contingency had the contingency occurred to them." Red Jacket Oil & Gas Co. v. United Fall Gas Co., 146 F.2d 645,50 (4th Cir. 1944)

> "'Contracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended... The standard is what a normally constituted (person) would have understood them to mean when used in their actual setting.'" Kipe Offset Process Co. v. U.S., supra. at p.344.

Plaintiff-appellee asked the Bankruptcy Court and the Bankruptcy Court obliged in rewriting the contract to conform to what plaintiff-appellee either intended to say, thought she said, or now in retrospect, would have liked to have said in the contract, so as to be certain that she was repaid all of her money. The District Judge erred in affirming the Bankruptcy Judge's interpretation. This is not the function of the courts and contracts will not be rewritten even though prudence and fairness might have determined that the contract be drawn that way, U.S. v. Standard Rice Co., Inc., 323 U.S.106 (1944). Such conduct on

the part of a court becomes particularly unfortunate when rights of creditors become fixed by statute in accordance with the express provisions of public documents which subsequently are rewritten to their detriment to prevent a hardship upon the initiator who publicly filed the very document.

The courts below rejected defendant-appellant's argument that the specific enumeration of collateral limited the application of the security interest to those items specified and negated any effectiveness of the ambiguous general description. Yet, the very explanation given by the Bankruptcy Judge (p.50a) for rejecting this position supports defendant-appellant's argument and is contrary to the conclusions of the Bankruptcy Judge which were affirmed by the District Judge. The Bankruptcy Judge explains the enumeration of the specific articles by the fact that the security agreement (p.57a) stated that the molds, as distinguished from other assets would be located at plants of contractors as well as at the debtor's plant in North Bergen, New Jersey; thereby indicating their intention to include the molds located at E.G.L. in Canada. Since the description of

the location expressly includes molds located in locations other than the debtor's plant, there was no necessity for the parties to specifically enumerate those molds which were in fact located in other locations, unless this was the sole collateral referred to.

Again, however, it is improper to search for unclearly expressed intent in description of collateral in security agreements. Rather, the parties are bound by what they have said, and as previously stated, the subject security agreement (p.57a) does not clearly indicate a security interest on all assets, which must be established for plaintiff-appellee to recover.

POINT III

COURTS SHOULD NOT SUPPLY LANGUAGE TO FORM CONTRACTS WHICH EASILY COULD HAVE BEEN, BUT WAS NOT, INCLUDED.

The District Judge and the Bankruptcy Judge below erred in inserting the word "all" and inserting the words "but not limited to" without which the security interest could not extend to the proceeds of the trustee's sale (with the exception of $40.00). Undeniably, the security agreement is a printed form contract in which the parties easily could have incorporated the

omitted language which was supplied by the courts below by implication. Our Supreme Court has admonished that courts should not stretch language to supply what the drafters could have, but failed to, include.

> "In accordance with the familiar rule in such circumstances we will not stretch the language when the parties drafting such a form contract have not included a provision it easily might have." The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 82,3 (1959).

Justice Brennan's opinion was quoted by our circuit who applied the very same rule. Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476 (2d Cir. 1971). The Bankruptcy Court could not have applied plaintiff-appellee's security interest to all of the assets sold by the Trustee without inferring that the general description of collateral intended to use the word "all" as a prefix; and again could not have so extended the security interest without inferring that the prefix, including, when referring to the specifically described collateral meant including "but not limited to". By adding these words which easily could have been included by the drafters, the District Judge and the Bankruptcy

Judge ignore the mandate of the Supreme Court and commit reversible error.

POINT IV

OTHER COURTS HAVE SIMILARILY CONSTRUED THE DESCRIPTION REQUIREMENTS OF SECURITY AGREEMENTS.

It is significant that while New York construes the sufficiency of collateral description in financing statements by the standards imposed in Section 9-402, states which do not incorporate these standards but determine the validity of financing statements by the general canon of construction imposed by Section 9-110, do not sustain the general collateral descriptions found valid in the New York cases cited above.

In Kentucky, Section 9-402 does not govern the sufficiency of the description of collateral in financing statements. The general description provided in Section 9-110 applies. Under this section, their courts held that the phrase "all farm machinery and equipment including but not limited to tractors, tanks, tooling and harvesting tools" was not a sufficient description under Section 9-110 with the exception of "tractors". In re Anselm, 344 F.Sup. 544,45; (W.D.Ky.1972).

In Kansas, the same sections are applicable and there it was held that "all personal property" was an insufficient description. In re Fuqua, 461 F.2d, 1186, 87 (10th Cir. 1972).

The holdings in these cases are applicable to our situation because the sufficiency of the description of a security agreement as provided in Section 9-203 is governed by the rule stated in Section 9-110, which was the controlling section in Anselm and Fuqua. The more flexible test provided in Section 9-402 applies to financing statements only. In re Laminated Veneers Inc., supra.

Neither are the New York cases cited above, Bank of Utica, Davidoff, Sunshine, inconsistent with this argument. Each of these cases which validated very general descriptions dealt exclusively with financing statements and therefore were decided by reliance upon the phrase in Section 9-402 permitting "a statement indicating the types, ... of collateral".

Each of these cases are clearly distinguishable because in each, a security agreement or mortgage existed which contained lengthy or detailed description of the

collateral while the financing statement which was filed contained something considerably less. None of these New York cases have sustained the authority of security agreements containing the sparse description in the financing statements nor did they stand for the principle that such a description in a security agreement is valid.

We cannot emphasize too strongly that the basis of defendant-appellant's argument is the failure of description in the security agreement, and not the description contained in the UCC-1 (p.59a). Our New York courts have recognized that something more than the simple description in the financing statement is required for the security agreement. In discussing "notice filing" they have made clear that the purpose of the financing statement is to put a searcher on inquiry who is expected to look to the security agreement to ascertain the true nature of the transaction. Beneficial Finance Co. of New York, Inc. v. Kurland Cadillac-Oldsmobile, Inc., 32 A.D. 2d 643, 300 N.Y.S. 2d 884 (2d Dept. 1969); Bank of Utica v. Smith Richfield Springs, Inc., supra; In re Davidoff, supra. Any interested party who would be led to the subject security agreement (p.57a) by the financing statement (p.59a) would find nothing more than the ambiguous description contained in the financing statement

(p.59a). There is nothing to indicate which machinery, fixtures or equipment constitutes the collateral. Without the word "all", or some other aid to description, the phrase used by plaintiff-appellee is insufficient.

This theory is clearly expressed by the Second Circuit in Laminated Veneers. In discussing why something more is required in a security agreement, they ask:

> "What would a potential creditor find upon examination of the security agreement in this case? The only mention of vehicles of any kind in the agreement is the listing of an International truck in Schedule A. Beyond that there is only the "omnibus clause" and the generic "equipment" therein. Any examining creditor would conclude that the truck as the only vehicle mentioned was the only one intended to be covered." In re Laminated Veneers, Inc., supra.

A text on security interest goes even further in ignoring the distinction between financing statements and security agreements by contending that such a general description of collateral as "machinery, equipment and fixtures" invalid for both a financing statement as well as the security agreement.

> "We may particularize in an illustration. A debtor has three machines in his factory located at 50 Federal Street. The security agreement says: 'All the machines now or

> hereafter in the factory at 50 Federal Street.' That description should be held sufficient. The security agreement says: 'One of the machines now in the factory at 50 Federal Street.' That description should be held insufficient, whether it appears in a security agreement or a financing statement. The three machines may be of different kinds, models and values; the description can and should identify (by serial number or otherwise) the particular machine which is meant. In the same way, a description of after-acquired property, which covers less than all such property should specify the types of property meant to be covered (by model number, manufacturer's name or any other appropriate method)." Gilmore, "Security Interest in Personal Property", (1st Ed. 1965), vol.I,p.350.

POINT V

PLAINTIFF-APPELLEE'S SECURITY INTEREST IS LIMITED TO THE SUM OF $40.00.

Because an extension of plaintiff-appellee's security interest to assets other than those specifically described in the security agreement (p.57a) requires the court to attach the security interest to collateral for which a reasonably specific description in the security agreement (p.57a) does not exist; and, because it requires the court to construe and rewrite the agreement (p.57a), such an extension would be unlawful, for the reasons

previously demonstrated.

Since the courts prefer to construe an agreement as lawful rather than opt for a construction which would render an agreement unlawful, Eddy v. Prudence Bonds Corp., 165 F.2d 157 (2d Cir.1947)Cert.Den. 333 U.S. 845, this court should limit the security agreement (p.57a) to the proceeds of the specifically identified collateral, to wit, $40.00.

POINT VI

THE SPECIFIC ENUMERATION OF COLLATERAL EXCLUDES THE APPLICATION OF THE GENERAL DESCRIPTION TO ALL OTHER COLLATERAL.

Plaintiff-appellee's security interest is limited to the specific molds described in the security agreement because the agreement fails to explain and distinguish between the general description "molds, tools, dies, component parts" and the specific description following the general description.

> "where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions." Restatement of Contracts, Section 236(c)

In interpreting contracts specific provisions are

given more weight than general provisions. Occidental Life Insurance Co. v. Marmaduke Corbyn Agency, supra.

The converse of the Ejusdem Generis canon of construction is also applicable to the subject security agreement (p.57a). This canon provides that where specific language is followed by general, the latter is restricted in application to the former. Fisher v. Town of Islip, 20 Misc. 2d 180, 189 N.Y.S. 2d 979; (Sup.Ct.Suff.Co. 1959), Aff'd 10 A.D. 2d, 984, 204 N.Y.S. 2d 82 (2d Dept. 1960), Rea'g. and App.den. 11 A.D. 2d 949, 207 N.Y.S. 2d 434, (2d Dept. 1960); see also Black's Law Dictionary, p.608, (Rev'd. 4th ed. 1968).

Conversely, the specific description following the general language "molds, tools, etc." should limit the applicability of this general language; this is in conformity to the comments following Restatement of Contracts, Section 236(c).

CONCLUSION

District Judge Pierce and Bankruptcy Judge Babitt should be reversed, their orders should be vacated, and the funds in defendant-appellant's possession should be adjudged free of any security interest or lien of plaintiff-appellee upon payment of $40.00 to plaintiff-appellee by the defendant-appellant, together with accrued interest on the sum of $40.00 from the 15th day of July, 1970.

Respectfully submitted,

HENRY & BRECKER, ESQS.
Attorneys for Defendant-
Appellant

Martin F. Brecker,
Of Counsel

Due and timely service of [redacted] copies of the within Brief is hereby admitted this 6th day of September, 1974

Attorney for Plaintiff-Appellee